

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

CENTRAL DIVISION

UNITED STATES OF AMERICA, * CR. 02-30017
*
Plaintiff, *
*
-vs-* ORDER
*
GARY FLUTE, SR., *
*
Defendant. *
*

On March 10, 2008, the District Court¹ issued an opinion disposing of most of Defendant, Gary Flute, Sr.'s claims in this 28 U.S.C. §2255 case. United States v. Flute, No. CR. 02-30017, 2008 WL 649139 (D.S.D. Mar. 10, 2008). The Court, however, determined that there were issues of fact as to whether Defendant's trial counsel failed to present evidence because (1) there was no exculpatory evident to present, (2) because counsel failed to discover such evidence, or (3) counsel assumed the trial court or the appeals court would eventually grant a mistrial. 2008 WL 649139 at *4. The Court also determined that it could not evaluate (1) whether counsel was ineffective in failing to move for the suppression of Defendant's pretrial statement to an FBI agent, because the Court did not have a copy of the statement, and (2) whether counsel was ineffective in failing to object to allegedly improper comments made by the prosecutor during closing argument, because a copy of the transcript of closing arguments had not been filed. Id. The Court directed that the Government serve

¹The Honorable Charles B. Kornmann, United States District Judge, presiding.

and file a response to these claims. Id. at *13. The Court, at the same time, referred the case to this Court for the purpose of appointing counsel, if appropriate, conducting any necessary hearings, including evidentiary hearings and submitting proposed findings of fact and recommendations for disposition of the case. Docket No. 143.

Following the District Court's referral Order, this Court reviewed the record, including the Government's Response and Brief to Defendant's §2255 Motion and Affidavit of trial counsel, Docket No. 150 and Defendant's Traverse to the Government's Response, Docket No. 152. After doing so, the Court noted that Defendant makes a number of allegations at pp. 4-9 of his Traverse in support of his claims. The Government should be afforded an opportunity to reply to these allegations, if it so desires, before the Court decides whether or not to grant an evidentiary hearing. Indeed, Eighth Circuit case law makes clear that a §2255 motion can only be dismissed without an evidentiary hearing if (1) the movant's allegations, accepted as true, would not entitle the movant to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact. Englen v. United States, 68 F.3d 238, 240 (8th Cir. 1995). Any such reply (and supporting documents), however, shall be served and filed on or before October 24, 2008. In the event that the Government chooses not to submit a reply, the Government shall notify the Court in writing of the same prior to October 24th.

Dated this 22nd day of September, 2008, at Pierre, South Dakota.

BY THE COURT:



MARK A. MORENO
UNITED STATES MAGISTRATE JUDGE

ATTEST:

JOSEPH HAAS, CLERK

BY 
Deputy

(SEAL)